IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.178 OF 2006

Tushar Harishankar Mhatre & Ors. ....Petitioners
V/s.
M/s.Mistry & Co. ....Respondent

Mr.Janak Dwarkadas with Mr.Sharan Jagtiani i/b Mr.D.M. Gaonkar for the Petitioners.
Mr.U.J. Makhija i/b Mannadiar & Co. for the Respondent.

CORAM : S.J. VAZIFDAR, J.
DATED : 26TH JUNE 2006.

P.C. :

1. This is a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set-aside an award dated 15.2.2006 passed by the sole arbitrator.

2. The Petitioners are the owner of a property which was to be developed by the Respondents, developing consultants under an agreement dated 6.8.1992, clauses 2, 5-a, and 9 whereof read as under :-

> "2. The OWNER has appointed:-
>
> (i) Shri Ishwarbhai Pragjibhai Narandas Mistry as the architect and Civil Engineer,
>
> (ii) Shri Ishwarbhai Pragjibhai

> Mistry as the structural engineer,
>
> for the purposes of development of the said property more particularly described in the Schedule hereunder written. The OWNER will, appoint a building contractor for undertaking construction of buildings and structures.
>
> 5(a) The DEVELOPMENT CONSULTANTS shall and will :
>
> (a) supervise the work of construction by architects, structural engineers, plumbing and sanitory contractors, building contractors, read contractors electrical contractors etc;
>
> 9. In consideration of the services to be rendered by the DEVELOPMENT CONSULTANTS herein provided, the OWNER shall pay to the DEVELOPMENT CONSULTANTS a sum calculated at the rate of 15 per cent of the total turnover, ascertained on the basis of the proceeds from the sale of all the tenements in the buildings and structures which may be constructed on the said property, excluding therefrom the value of the tenements which may be required to be handed over to the State Government under or in pursuance of the no objection or permission under the Ceiling Act for development of the said property or the Municipal Corporation under any approval, no objection, permission or consent.

3. The learned arbitrator awarded a sum of Rs.66,70,000/- in favour of the Respondent together with interest at 6% p.a. from the date of the award till payment and/or realisation. The learned

arbitrator came to the conclusion that the Respondents had discharged their obligations under the agreement. Suffice it to note that the learned arbitrator placed reliance, and if I may say, rightly, inter-alia upon the fact that the Petitioners had paid the Income Tax Authorities an aggregate sum of Rs.20,52,158/- for and on behalf of the Respondent. The learned arbitrator held that the said payment having been made pursuant to a notice which was in the nature of a garnishee attachment amounts to an admission of liability on the part of the Respondents that such amount was in fact due and payable by the Petitioners to the Respondents and had been paid to the Income Tax Authorities accordingly. The learned arbitrator has also come to the conclusion that the Respondents have discharged their obligations under the contract. This finding is based on the record and after an analysis of the same. I find it impossible to hold that the findings are unsustainable.

4. The only ground of challenge is based on the findings of the learned arbitrator in paragraph 50 of the award. Since the point was urged strongly, it would be convenient to reproduce the same :-

> "50. The Claimants have claimed a sum of Rs.1,14,62,137 being 15% of

> the sale proceeds of the tenements already sold. The respondents have not disputed the correctness of the amount of Rs.1,14,62,137 as being 15% of the sale proceeds of the tenements already sold. In view of the apparent overlapped of work carried out by Mr.I.P. Mistry as architect and civil engineer for which he has been paid a sum of Rs.24 lakhs and the work required to be carried out by Mr.I.P. Mistry as per the terms of the said agreement it would be only fair that the said amount of Rs.24 lakhs be deducted out of the said amount of Rs.1,14,62,137/- (Rupees One Crore Fourteen Lac Sixty Two Thousand One Hundred and Thirty Seven only). One of the factors taken into account in reducing the claimants claim by the amount of Rs.24,00,000/- (Rupees Twenty Four Lacs) paid to the said Mr.I.P. Mistry is that the Claimant and their witness Mr.I.P. Mistry had misrepresented himself to original Respondent and Respondents before commencement of the arbitration proceedings and all through these proceedings as being a qualified architect which he is not and never was. The said Mr.I.P. Mistry falsely represented himself as being a qualified architect.

5. The challenge to the award is not well founded. The observations of the learned arbitrator that the claimants i.e. the Respondents herein had misrepresented I.P.Mistry to be a qualified Architect, is probably incorrect, but that is a mistake which is prejudicial to the Respondents and not to the Petitioners. As observed earlier the said I.P.Mistry

had in fact been appointed by the Petitioners as an Architect even before the said agreement was entered into. This is so stated as an express term viz. clause 2.1 reproduced earlier. The fact that he is related to the Respondents is immaterial. Despite the same, the learned arbitrator has deducted the amounts which were paid to I.P.Mistry. In fact the Respondents and certainly not the Petitioners are aggrieved and prejudiced by the same.

In the circumstances, the Petition is dismissed.